Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

RICHARD JOSEPH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In granting habeas corpus relief, did the Sixth Circuit misapply settled rules that limit its role and authority and erroneously set aside reasonable state-court determinations of fact?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Ralph Coyle, Respondent-Appellee Below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is Richard Joseph, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Joseph v. Coyle*, 469 F.3d 441 (6th Cir. 2006), is reproduced at App. 1a-57a. The Order and Opinion of the United States District Court for the Northern District of Ohio is reproduced at App. 58a-280a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on November 9, 2006. The Warden timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

INTRODUCTION

On the evening of June 26, 1990, Ryan Young, a sophomore at Bath High School in Allen County, Ohio, went to his girlfriend's house to watch a movie. He stayed until a few minutes before midnight, when he left to drive home. He never made it. The next morning, discovering that Ryan had not come home, Ryan's parents alerted the police and an extensive search by the authorities ensued. There were no witnesses to his disappearance. Based on information provided by Ryan's girlfriend, investigators identified Respondent Richard Joseph as a suspect. Joseph stated that he was with a friend, Jose Bulerin, on the night Ryan disappeared. On July 4, 1990, investigators searched a sand and gravel pit owned by Joseph's grandparents. They discovered Ryan's body in a shallow grave. He had been stabbed at the base of his skull and in his right flank. Both wounds were lethal. Shortly thereafter Joseph and Bulerin were jointly indicted for the aggravated, capital murder and kidnapping of Ryan Young. App. 9a, 73a.

At Joseph's separate trial, the prosecution presented circumstantial but compelling evidence that Joseph and Bulerin, acting in concert, kidnapped and murdered Ryan. The jury convicted Joseph and sentenced him to death. Joseph appealed his convictions and sentence to the Ohio courts. He claimed, among other things, that the evidence was legally insufficient to sustain the capital specification under which he was sentenced to death, and that corresponding instructions to the jury were erroneous. His trial counsel did not object to the specification or the allegedly erroneous instructions. The Ohio courts rejected Joseph's claims of error and concluded that the evidence against him satisfied constitutional standards. Joseph then filed a habeas corpus petition. Despite the failure of Joseph to comply with state procedures by lodging appropriate objections at trial, the district court granted relief, vacating Joseph's death sentence. The Sixth Circuit affirmed and expanded the district court's grant of relief.

The Court has not hesitated to review and reverse a court of appeals' judgment in habeas corpus, where a concern is present that the court below "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record," and where review confirms that the court "misappli[ed] settled rules that limit its role and authority." *Rice v. Collins*, __ U.S. __, 126 S. Ct. 969, 972 (2006). This case presents the straightforward question whether the Sixth Circuit, in affirming and expanding the district court's grant of relief, exceeded its authority in federal habeas corpus. The Warden maintains that the Sixth Circuit did so, by substituting its own view for that of the state court on a question of state law; by relying on its own dubious precedent in place of the Court's decisions; and by ignoring relevant factual findings by the state courts.

Accordingly, the Warden asks the Court to review and reverse the Sixth Circuit's judgment.

STATEMENT OF THE CASE

On July 12, 1990, the Grand Jury of Allen County, Ohio, jointly indicted Joseph and co-defendant Jose Bulerin on a single count of aggravated murder in violation of Ohio Revised Code 2903.01(B). Ohio law authorizes the death penalty for aggravated murder committed during a kidnapping where "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." Ohio Rev. Code 2929.04(A)(7). The indictment included a capital specification which alleged that the aggravated murder was committed while Joseph and Bulerin were committing kidnapping, and that "the offenders were the principal offenders in the commission of the kidnapping." App. 15a.

On July 19, 1990, Joseph's appointed counsel filed several motions on Joseph's behalf, including a motion for a bill of particulars. Counsel did not file a motion objecting to the legal sufficiency or correctness of the capital specification. The case proceeded as a capital prosecution, with the defense filing numerous additional motions pertaining specifically to various procedures and issues pertinent only in capital cases. On December 5, 1990, the prosecution provided a bill of particulars which averred specifically that Joseph fatally stabbed Ryan Young after waylaying Ryan in Ryan's car and forcing Ryan to drive to another location. Jury selection began on January 7, 1991, App. 189a, and the jury trial concluded on January 22, 1991, App. 62a, 93a.

In his final instructions during the guilt phase of the trial, the trial judge described the capital specification as stated in the indictment, namely, that Joseph allegedly killed Ryan during the commission of the kidnapping, and that Joseph and Bulerin were "the principal offenders in the commission of the kidnapping." However, the trial judge

subsequently reviewed the jury form upon which the jury would render its verdicts in writing. The form correctly stated that Joseph was "the principal offender in the commission of the aggravated murder." The defense offered no objections to the instructions and neither the trial judge nor the prosecutor noted the apparent discrepancy in the description of the capital specification. The jury returned findings of guilty on the aggravated murder charge and specification, all twelve jurors signing the verdict form. App. 93a-94a.

A sentencing hearing convened on January 28, 1991. In his preliminary instructions to the jury, the trial judge referred to the aggravating circumstance as described in the specification. However, in his final instructions, the trial judge described the specification indicated in the jury's previous verdict, namely, that Joseph was the principal offender in the aggravated murder. Again, the defense did not object, and neither the prosecution nor the trial judge noted the apparent discrepancy between the trial court's preliminary and final instructions. On January 30, 1991, the jury reached a verdict which recommended a sentence of death. App. 62a. In a written sentencing opinion issued on February 8, 1991, the trial court accepted the jury's verdict. The trial court referred to Joseph as a principal offender in the commission of the aggravated murder. App. 101a.

Upon direct appeal, Joseph claimed, among other things, that the evidence was legally insufficient to sustain the capital specification; that the specification and instructions to the jury were erroneous; that his trial attorneys were constitutionally ineffective in failing to object to the specification and instructions. The Ohio Court of Appeals affirmed Joseph's conviction and sentence and the Supreme Court of Ohio affirmed the judgment of the Court of Appeals. The Supreme Court of Ohio found sufficient circumstantial evidence, including evidence that Joseph had a motive to kill Ryan, from which a reasonable juror could find that Joseph was a principal in the commission of aggravated

murder. The Supreme Court of Ohio held that Joseph waived his challenges to the indictment and instructions by failing to object at trial, and rejected summarily Joseph's related ineffective counsel claim. However, in the course of its review for plain error, the Supreme Court of Ohio held that Joseph had not been prejudiced, given the facts that the jury form correctly stated the capital specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form. *State v. Joseph*, 73 Ohio St. 3d 450, 457 (1995).

On July 13, 2001, Joseph filed with the United States District Court for the Northern District of Ohio a petition for a writ of habeas corpus in which he presented, among other claims, his claims of insufficient evidence, erroneous indictment and instructions, and ineffective counsel. App. 124a-127a. The Warden opposed the petition, arguing that the state courts reasonably rejected Joseph's claims of insufficient evidence and ineffective counsel, and that Joseph's remaining claims were procedurally defaulted. On December 22, 2004, the district court issued an opinion and order vacating Joseph's death sentence. App. 279a-280a. The district court rejected Joseph's insufficiency of the evidence claim, App. 261a-266a, but sustained Joseph's constitutional challenges to the indictment and instructions, App. 181a-182a, and his claim of ineffective trial counsel, 224a-228a.

The district court held specifically that the Supreme Court of Ohio, in rejecting Joseph's insufficiency of the evidence claim, did not contravene or unreasonably apply the constitutional standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). App. 262a-266a. The district court granted the writ on Joseph's erroneous specification and instruction, and ineffective assistance of counsel claims. Rejecting the Warden's procedural default defense, the district court found that Ohio did not consistently enforce its waiver rules with respect to defective indictments, and that the ineffective assistance of trial counsel excused Joseph's

failure to object to the instructions. In the latter regard, the district court essentially held that the instructions were so erroneous that counsel must have been constitutionally ineffective in failing to object at trial. App. 227a.

Joseph appealed the district court's order insofar as it denied relief. The Sixth Circuit sustained the appeal in part, holding that Joseph's challenge to the sufficiency of the evidence on the capital specification also warranted habeas corpus relief. The Sixth Circuit did not dispute the evidence upon which the Supreme Court of Ohio held that a reasonable jury could have found that Joseph fatally stabbed Ryan Young, e.g., the evidence that more than one fatal wound was administered and that Joseph had a motive to kill Ryan. Rather, the Sixth Circuit held that the Supreme Court of Ohio unreasonably applied the *Jackson* standard in light of "clear" Ohio precedent "requir[ing] proof that the defendant personally inflicted the death blows in a situation where (as here) the defendant and a coconspirator are both present at the scene." App. 24a.

The Sixth Circuit next concluded that Joseph's conviction based on the capital specification as stated in the indictment violated Joseph's rights under the Eighth Amendment. The Sixth Circuit reasoned that Joseph's Eighth Amendment claim "is materially indistinguishable" from the prisoner's Eighth Amendment claim in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), reversed and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). Accordingly, the Sixth Circuit granted relief based on its Eighth Amendment analysis in *Esparza*. The Sixth Circuit acknowledged the Court's reversal of its grant of relief in *Esparza*. However, the Sixth Circuit described the Court's reversal as a "response to our holding that the Eighth Amendment violation was not subject to harmless error analysis," and concluded that the Court "did *not* disturb our conclusion that a constitutional violation occurred." App. 27a.

The Warden cross-appealed the grant of the writ, arguing that the district court erred in rejecting the Warden's procedural default defenses and in holding that trial counsel was constitutionally ineffective. The Sixth Circuit denied the Warden's appeal. Based on its prior precedents, the Sixth Circuit agreed with the Warden that Joseph's "indictment and jury instruction claims" were procedurally defaulted, and that federal habeas review of the claims is barred unless Joseph can show cause and prejudice to excuse his defaults. However, the Sixth Circuit held that Joseph's trial counsel were constitutionally ineffective in failing to object to the specification and instructions, and that the ineffectiveness established both cause and prejudice. In the latter regard, the Sixth Circuit found it reasonably probable that, had counsel performed effectively, the prosecutor would have declined to charge Joseph with a capital defense, the jury would have found Joseph not guilty, or the trial court would have set aside or declined to approve the jury's verdict of death. App. 28a-35a.

REASONS FOR GRANTING THE WRIT

A federal court's power in habeas corpus extends solely to questions of federal law. "We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court." *Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604 (2005), citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Under the standard of review set forth by 28 U.S.C. 2254(d)(1), a federal court in habeas corpus may overrule a state court only if the state court's determination on a federal question "applies a rule that contradicts the governing law set forth in *our* cases," or "confronts a set of facts that are materially indistinguishable from a decision of *this Court* and nevertheless arrives at a result different from *our* precedent." *Mitchell v. Esparza*, 540 U.S. at 15-16, quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) (emphasis added).

The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law. *Rice v. Collins*, 126 S. Ct. at 976. Where the state court's conclusion is fact-based, to overturn it the federal court must find the state court's conclusion "an unreasonable determination ~~of the~~ facts in light of the evidence presented in the State court proceeding." 126 S. Ct. at 974, quoting 28 U.S.C. 2254(d)(2). "State-court fact findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.*, quoting 28 U.S.C. 2254(e)(1). While a federal court in habeas corpus may be obligated to exercise its independent judgment on a constitutional question presented by the facts of the case, it is not free to disregard other relevant factual findings by the state court. *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973).

In granting habeas corpus relief, the Sixth Circuit misapplied these settled rules that limit its authority and role in habeas corpus, and erroneously disregarded relevant reasonable state-court determinations of fact. First, the Sixth Circuit, in overturning the Supreme Court of Ohio's decision on Joseph's insufficiency of the evidence claim, exceeded its role in habeas corpus by concluding that Ohio law required evidence that Joseph "personally" killed Ryan because a codefendant also took part in the murder. Second, the Sixth Circuit patently exceeded its authority in finding a violation of the Eighth Amendment based one of its own prior decisions that was subsequently reversed by this Court. Third and finally, in rejecting the Warden's procedural default defenses and granting relief based on the claimed ineffectiveness of trial counsel, the Sixth Circuit simply ignored the pivotal, relevant factual findings of the state court, to wit, that Joseph could not have been prejudiced by the mistaken language in the specification and instructions, in view of the facts that the jury form correctly stated the capital

specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form.

A. The Sixth Circuit, in overturning the Supreme Court of Ohio's decision on Joseph's insufficiency of the evidence claim, exceeded its role in habeas corpus by substituting its judgment on a question of state law for the judgment of the state court.

The Sixth Circuit improperly overturned the Ohio court's determination that the prosecution presented sufficient evidence to convict Joseph on the death specification. The Sixth Circuit based its conclusion on its improper independent judgment that Ohio state law requires a prosecutor to prove that Joseph, and not his coconspirator, inflicted the fatal wounds.

On direct appeal, the Supreme Court of Ohio rejected Joseph's insufficiency of the evidence arguments, finding sufficient evidence in the record to convince the trier of fact that Joseph was guilty beyond a reasonable doubt of the kidnapping and murder of Ryan Young, and that Joseph was the principal offender in the commission of the aggravated murder. In finding legally sufficient evidence that Joseph actually killed Ryan Young, the Supreme Court of Ohio relied on evidence that Joseph had a motive to kill, based on evidence that he was jealous of Ryan's relationship with Cara Wireman, Joseph's former girlfriend; that just prior to Ryan's abduction, the white Cutlass often driven by Joseph was seen near Cara's home on Thayer Road as Ryan was about to leave; that Ryan's body was wrapped in Visqueen which matched Visqueen recovered from the job site at where Joseph had been working; that Joseph had a black ninja mask, and a black ninja mask was found under the body of the victim; and that Ryan suffered two stab wounds, either of which could have been fatal. Viewing this evidence in a light most favorable to the prosecution, the Supreme Court of Ohio held that it was as sufficient for a rational trier of fact to

find that appellant was the principal offender, i.e., an actual killer of Ryan Young. *State v. Joseph*, 73 Ohio St. 3d at 459.

The Supreme Court of Ohio applied the correct standard of constitutional sufficiency prescribed by this Court and as adapted by controlling state precedent. *See State v. Jenks*, 61 Ohio St. 3d 259, 273 (1991), following *Jackson v. Virginia*, 443 U.S. 307 (1979). It then determined that a rational factfinder could have found guilt beyond a reasonable doubt, based upon the circumstantial evidence linking Joseph to the kidnapping and murder, coupled with the evidence of a motive to commit the crimes. There is no indication that the Supreme Court of Ohio erroneously recounted the evidence of record upon which it relied. Nor is it unreasonable to conclude, based on the evidence cited, that a reasonable jury could have concluded that both Joseph and Bulerin inflicted the fatal knife wounds. Thus, as recognized by the district court, the Supreme Court of Ohio's decision is neither contrary to nor an unreasonable application of federal law as clearly established by this Court's decisions.

In habeas review, the district court properly affirmed Supreme Court of Ohio's conclusion on Joseph's insufficiency of evidence claim. In his habeas petition, Joseph relied primarily on the prosecutor's apparent concession at trial that the state could not prove whether Joseph or Bulerin inflicted the fatal wounds. Noting that its review of the Supreme Court of Ohio's decision was "limited to a determination of whether its conclusion was objectively unreasonable," the district court denied relief. The district court reasoned that the prosecutor's arguments did not necessarily establish that the evidence was not sufficient to sustain Joseph's conviction. App. 262a-266a.

The Sixth Circuit, however, improperly concluded that the Supreme Court of Ohio unreasonably applied *Jackson v. Virginia*. The Sixth Circuit found that Ohio law required that "when the defendant and a coconspirator are present at the

time and place of the murder, there must be evidence showing that the defendant struck the fatal blow(s)." App. 22a. The Sixth Circuit noted that none of the evidence cited by the state court "shows that Joseph personally inflicted either stab wound," App. 22a, and concluded that a reasonable juror could have inferred based on the evidence that either Joseph or Bulerin, or both, stabbed Ryan. Thus, the Sixth Circuit construed Ohio law to require, in such circumstances, that the prosecution present additional evidence that showed Joseph stabbed Ryan but excluded or did not implicate Bulerin, evidence that did *not* necessarily show that Bulerin inflicted one of the fatal wounds. According to the Sixth Circuit, the Supreme Court of Ohio unreasonably denied Joseph relief in light of this "clear" state law precedent. App. 24a.

The Sixth Circuit's conclusions regarding Ohio law improperly ignored Ohio's own interpretation of its law. The Supreme Court of Ohio has held definitively that "there can be more than one actual killer—and thus more than one principal offender—in an aggravated murder." *State v. Keene*, 81 Ohio St. 3d 646, 655 (1998), citing *State v. Joseph*, 73 Ohio St 3d at 469 (Moyer, C.J., dissenting in part and concurring in part). Notably, in dissent, Chief Justice Moyer did not find that the evidence was legally insufficient under the constitutional standard set forth in *Jackson v. Virginia*, nor did he suggest the rule derived by the Sixth Circuit. Rather, Chief Justice Moyer would have reversed the death sentence, based on the requirement of Ohio Rev. Code 2929.05 that the court independently review and determine whether the death penalty specification is supported by the evidence. Such a review is *not* the equivalent of a test for legal sufficiency. *See State v. Johnson*, 88 Ohio St. 3d 95, 112 (2000) (Ohio Rev. Code 2929.05 requires the court to determine whether the weight of the evidence supports a sentence of death, and "[a] verdict can be against the

manifest weight of the evidence even though legally sufficient evidence supports it.").

The Sixth Circuit exceeded its authority in habeas corpus by overturning the decision of the Supreme Court of Ohio. While the *Jackson* standard must be applied with reference to the elements of an offense as provided by state law, a federal court in habeas corpus is not free to substitute its judgment for the judgment of the state court on the elements of a criminal offense, which remain a question of state law. *Bradshaw v. Richey*, 126 S. Ct. at 603-604.

Moreover, the decisions of the Supreme Court of Ohio cited by the Sixth Circuit do not support its holding that under Ohio law "when the defendant and a coconspirator are present at the time and place of the murder, there must be evidence that the defendant struck the fatal blow(s)." App. 22a, citing *State v. Cunningham,* 105 Ohio St. 3d 197 (2004), and *State v. Taylor*, 66 Ohio St. 3d 295 (1993). No such rule can be found in these decisions. In *Cunningham*, the death penalty specifications did not allege that the defendant was a principal offender and hence no issue was even raised as to evidentiary sufficiency. 105 Ohio St. 3d at 200. Similarly, in *Taylor,* the death sentence was based on the jury's finding that the defendant was an accessory to the murder but acted with the prior calculation and design to kill. On appeal, the court held that there was insufficient evidence of prior calculation and design, and that, absent proof of prior calculation and design, conviction as an accomplice did not *as a matter of law* render the defendant a "principal" for the purposes of Ohio Rev. Code 2929.04(A)(7). The court's brief discussion of the evidence indicated simply that the co-defendant admitted to striking the fatal blows and that "there [was] no evidence to the contrary." 66 Ohio St. 3d at 307.

Nor is the Sixth Circuit's decision supported by its citation to the prosecutor's argument at trial that he "[did not] know who struck the death blow." App. 24a. The Sixth

Circuit cited no Supreme Court decision holding that prosecution's arguments at trial may be considered in determining whether the *evidence* presented by the state meets the constitutional standard of sufficiency. In any event, the prosecutor's argument, in context, is simply an obvious admission that because there were no witnesses to the murder other than the perpetrators, it could not possibly prove that Joseph and not Bulerin stabbed Ryan. The prosecutor did not suggest that it was required to prove this in order for the jury to conclude that Joseph inflicted the fatal wounds. And, the prosecutor correctly argued that the state was not required to show that Joseph actually stabbed Ryan to secure a guilty verdict on the aggravated murder count itself. *See Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398, 2406 (2005).

In short, the Sixth Circuit unquestionably exceeded its authority in habeas corpus by granting relief on Joseph's insufficiency of the evidence claim.

B. The Sixth Circuit exceeded its authority in finding a violation of the Eighth Amendment based one of its own prior decisions that was subsequently reversed by the Court.

The Sixth Circuit found that Joseph's conviction based on the capital specification as stated in the indictment violated Joseph's rights under the Eighth Amendment. The Sixth Circuit relied solely on its prior decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), reversed and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). Acknowledging the Court's reversal of its grant of relief in *Esparza*, the Sixth Circuit described the Court's reversal as a "response to our holding that the Eighth Amendment violation was not subject to harmless error analysis," and concluded that the Court "did not disturb our conclusion that a constitutional violation occurred." The Sixth Circuit found that "as in *Esparza I*, the jury never found the statutorily required [capital specification], so the imposition of the death

penalty in unquestionably a violation of the Eighth Amendment." App. 26a.

The Sixth Circuit fundamentally erred in granting relief based on its prior decision in *Esparza*. First, contrary to the Sixth Circuit's finding, the Court's reversal of the Sixth Circuit's grant of relief in *Esparza* was not limited to simply correcting the Sixth Circuit's failure to apply a harmless error analysis. The Court initially and fundamentally found that the Sixth Circuit "failed to cite, much less apply," 28 U.S.C. 2254(d)(1) in granting habeas corpus relief. *Mitchell v. Esparza*, 540 U.S. at 15. In other words, the Sixth Circuit failed to determine whether Esparza's Eighth Amendment claim satisfied the basic requirement for relief. Thus, the Sixth Circuit's "constitutional analysis" in *Esparza* can hardly be described as "undisturbed," to the extent that it is proposed as a basis of relief in federal habeas corpus.

Second, the Court has never found an Eight Amendment violation under the facts presented in *Esparza* or in any other comparable case. In *Apprendi v. New Jersey*, 530 U.S. 466, 482-483 (2000), the Court held that if a state makes an increase in the defendant's punishment contingent on the finding of a fact, then the Sixth Amendment requires that such fact be found by a jury beyond a reasonable doubt. However, until very recently, it was not clearly established whether the Court's ruling in *Apprendi* applied in capital cases. *See Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this Court has never held that the failure of a jury to find a statutorily required aggravating circumstance is "unquestionably" a violation of the Eighth Amendment. *Ring v. Arizona*, 533 U.S. at 612 (Scalia, J., concurring) (noting that Court has not held that jury sentencing in capital cases is mandated by the Eighth Amendment).

In sum, the Sixth Circuit exceeded its authority by granting relief based on its decision in *Esparza v. Mitchell.*

C. In rejecting the Warden's procedural default defenses and granting relief based on the claimed ineffectiveness of trial counsel, the Sixth Circuit erred in ignoring relevant factual findings of the state court.

Even where a state prisoner exhausts available state court remedies, if the prisoner has failed to raise or preserve his constitutional claim in accordance with state procedural rules and the state courts have not addressed the merits of the claim due to the procedural default, habeas corpus review is barred unless the petitioner shows cause for the default and actual prejudice resulting from the constitutional violation. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *Murray v. Carrier*, 477 U.S. 478 (1986). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." 477 U.S. at 486, quoting *Engle v. Isaac*, *supra*, 456 U.S. at 133-134. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier*, 477 U.S. at 488.

In *Strickland*, the Court recognized that a criminal attorney's failure to act according to applicable professional standards does not necessarily result in the deprivation of the right to assistance of counsel guaranteed by the Sixth Amendment. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, citing *United States v. Morrison*, 449 U.S. 361, 364-365 (1981). Thus, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court has recognized explicitly the defendant's higher burden to show a reasonable probability of a different result where an objection has not been lodged at trial, as opposed to the government's burden to show that a constitutional error properly preserved for review had no effect on the outcome of the trial. *United States v. Benitez*, 542 U.S. 74, 83 (2004) (applying higher *Strickland* standard to a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11). It is beyond dispute that under *Strickland* the petitioner has the burden to establish a reasonable probability that but for counsel's error the result of the proceedings would have been different. *Strickland*, 466 U.S. at 649. Conversely, where a constitutional error has been properly preserved for review, the federal court must grant relief if it has grave doubt as to the possible effect of the error on the proceedings. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

Based on its prior precedents, the Sixth Circuit agreed with the Warden that Joseph's "indictment and jury-instruction claims" were procedurally defaulted, and that federal habeas review of the claims is barred unless Joseph can show cause and prejudice to excuse his defaults. App. 28a. The Sixth Circuit held that Joseph's trial counsel were constitutionally ineffective in failing to object to the specification and instructions, and that the ineffectiveness established both cause and prejudice. App. 28a-35a. In the latter regard, the Sixth Circuit found it reasonably probable that had counsel performed effectively the prosecutor would have declined to charge Joseph with a capital defense, the jury would have found Joseph not guilty, or the trial court would have set aside or declined to approve the jury's verdict of death. App. 34a.

In reaching the above conclusion, the Sixth Circuit ignored the pivotal, factual findings of the Supreme Court of Ohio, relevant to the possible effect of the defective specification and the corresponding jury instructions. In the course of its review for plain error, the Supreme Court of Ohio held that Joseph had not been prejudiced by the defective specification and instructions, given the facts that the jury form correctly stated the capital specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form. *State v. Joseph*, 73 Ohio St. 3d at 457. These factual findings obviously are relevant to whether there is a reasonable probability that the jury would *not* have found that Joseph was the principal offender in the aggravated murder, had trial counsel objected to the specification and the instructions.

As recognized by the district court, the Supreme Court of Ohio's assessment and factual findings were objectively reasonable. In fact, the district court found specifically that it was just as likely that the jury actually found that Joseph was a principal in the aggravated murder. In the words of the district court, "[T]he jury may have convicted Mr. Joseph based on the proper specification—as being the principal offender in the commission of the aggravated murder . . . ." App. 175a. As found by the Ohio courts, and recognized by the district court, while the trial court read the flawed specification to the jury as part of the instructions, the court also read to the jury the verdict form which contained the properly worded specification, and the jury signed the form in rendering its verdict. App. 180; *Joseph*, 73 Ohio St. 3d at 461.

In comparison, the factual findings of the Sixth Circuit are highly unreasonable. Had counsel objected to the indictment, it is highly unlikely that the prosecutor would have declined to charge Joseph with a capital defense. As found by the Supreme Court of Ohio, the prosecutor simply could have cured the defect by moving to amend the

indictment. *Joseph*, 73 Ohio St. 3d at 457. It is possible that the jury might have found that Joseph was not a principal offender in the aggravated murder, had the instructions on this point been clearer. But this is not a situation where the jury has issued a general verdict, the import of which is dependent on the jurors' interpretation of ambiguous instructions. Here all twelve jurors signed a verdict form signifying that Joseph was a principal offender in the aggravated murder. Thus, it would seem reasonably *unlikely* that there verdict would have been different, had the instruction been clearer. Finally, it is pure speculation that the trial court would have set aside or declined to approve the jury's verdict of death, had counsel lodged belated objections.

In sum, the Sixth Circuit erred in ignoring relevant factual findings by the Supreme Court of Ohio.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

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